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He must prove, in addition, that the donor had competent and independent advice as to the effect of his act.⁷

In *Post v. Hagan*,⁸ the court said: "Proper independent advice in this connection means that the donor had the preliminary benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform him correctly as to its legal effect, but who was furthermore so dissociated from the interests of the donee as to be in a position to advise with the donor impartially and confidently as to the consequences to himself of his proposed benefaction."

Applying this rule to our principal case, the decision was inevitable. For there was here no form or semblance of such advice, and the subject-matter of the gift represented about all the property that the donor owned over and above his debts.

The public policy upon which such a rule is founded is apparent. It is just and reasonable that it should not be possible for those who, by old age or illness, may be deprived of their mental vigor, to deprive themselves of their means of support, even in the absence of irresistible importunities, unless advised so to do by disinterested and competent parties. It is, therefore, not surprising to find the authorities outside of New Jersey agreeing with such a rule.⁹ It is submitted that what few cases hold that the receipt of such advice is not necessary, are really cases in which the donor and donee did not stand in a confidential relation at all.

The interesting question which arises is as to how much a donor may give, without bringing himself within this rule. The court in our principal case wisely remarks that the question is not so much one of definite fractions, as of practical results. Judge Stephens goes on to say: "I think the practical rule . . . is, that a donor, having barely sufficient property to sustain himself for the rest of his life, shall not irrevocably and without advice, give away so much of it as to leave himself an object of charity." This seems eminently reasonable.

P. V. R. M.

NEGLIGENCE—LIABILITY OF A RAILROAD COMPANY, AND OF THE CONSIGNEE TO WHOM IT HAS DELIVERED A DEFECTIVE CAR, FOR INJURY TO THE CONSIGNEE'S SERVANT.—In the recent Massachusetts case of *D'Almeida v. Boston & M. R. R.*,¹ a railroad delivered a number of cars loaded with coal to a milling company upon a side-track. In pursuance of an arrangement with the railroad, certain

⁷ *Coffey v. Sullivan*, 49 Atl. 420 (N. J. 1901). *Slack v. Rees*, 66 N. J. Eq. 447 (1903), as interpreted by *Post v. Hagen*, *supra*.

⁸ *Caspari v. The First German Church of the New Jerusalem*, 82 Mo. 649 (1884); *Gibson v. Hammaug*, 63 Neb. 349 (1901).

⁹ *Soberaues v. Soberaues*, 97 Cal. 140 (1893); *Couchman's Adm. v. Couchman*, 98 Ky. 109 (1895).

¹ 95 N. E. Rep. 398 (Mass. 1911).

employees of the milling company went upon the side-track and moved the cars over a spur of track leading to the mill, where the coal was to be unloaded. While the cars were thus in transit one of the cars upset because it was out of repair, and an employee of the milling company was killed. Both the railroad and the milling company were held liable to the administrator of the deceased.

The basis of the liability of the milling company was held to be the duty which an employer owes his servants to provide safe instrumentalities with which to work. Having adopted these cars as part of its works for the time being, the milling company was liable for injuries caused by defects discoverable by reasonable diligence.² In thus deciding, the court is clearly right in principle, but in precedent the authorities are divided. Cases in the courts of Massachusetts,³ Illinois,⁴ and Virginia⁵ support the principal case. On the other hand the courts of Pennsylvania⁶ and Indiana⁷ impose no duty upon the consignor or consignee of a car delivered into his possession. The opinions in these latter cases are brief and it is submitted that they are hard to justify. Had the master bought or hired the cars which he had temporarily taken over from the railroad and made part of his own plant, he would most certainly be liable to his servants for obvious defects. Manifestly no distinction can be based upon the mere circumstance of his limited right of property in the cars. So far as his duty to his employees is concerned, he should be regarded as the owner *pro tempore*.

The railroad was held liable because it had selected and forwarded the cars, the defects in which had caused the death of the plaintiff's intestate. It was held to owe a duty to the intestate to use ordinary care in the selection of the car. No fundamental reason is assigned for the existence of this obligation. It is submitted that the true basis of the duty is to be found in the benefit accruing to the railroad from its traffic arrangement with the intestate's employer.⁸ It is not meant that the right of action is based solely upon the agreement; for obviously the intestate was not a party to the contract, and cannot derive benefit therefrom.⁹ Since the railroad receives a benefit, perhaps directly in the shape of mileage or demurrage charges, and certainly indirectly in the shape of increased business because of the convenience to the shipper in being permitted to unload directly upon his own premises, the railroad, in

² Labatt on Master and Servant, Vol. 1, p. 372.

³ Spaulding v. Flynt Granite Co., 159 Mass. 587 (1893); followed in Foster v. N. Y. N. H. & H. R. R., 187 Mass. 21 (1904).

⁴ Sack v. Dolese, 137 Ill. 129 (1891); New Ohio Co. v. Hendman, 119 Ill. App. 287 (1905).

⁵ Risque v. C. & O. R. R., 104 Va. 476 (1905).

⁶ Anderson v. Oliver, 138 Pa. 156 (1890); McMullen v. Carnegie Bros. & Co., 158 Pa. 518 (1893); McGinley v. L. C. & N. Co., 224 Pa. 408 (1909).

⁷ H. & B. Car Co. v. Przewdzsankowski, 170 Ind. 5 (1908); following dictum in Neutz v. Coal & Coke Co., 139 Ind. 411 (1894).

⁸ Winterbottom v. Wright, 10 M. & W. 109 (1842).

return for this benefit owes a duty to all those who work with, or upon, the cars under this mutually beneficial arrangement, to use ordinary care to see that the cars are reasonably safe for the contemplated uses.

The celebrated case of *Heaven v. Pender*,¹⁰ declares a broader rule, but the element of benefit to the person who supplied the dock furnishings is remarked upon in the case. The suggested test of liability has been consciously applied by the courts in but few cases which deal with the liability of a railroad to the servant of a shipper or consignee, who was injured by reason of a defect in the car delivered by the railroad; but an examination of the facts of each case shows that the element of benefit to the railroad was always considered in the case. In *Elliott v. Hall*,¹¹ it was held that owners of a colliery had such direct beneficial interest in the receipt and unloading of the coal by the consignee that they were liable to his servant who was injured by a defective car. In *Roddy v. Mo. Pac. R. R.*¹² the interest of the railroad in carrying large shipments from a quarry was held to raise a duty to furnish safe cars. The same idea, more or less prominently and clearly expressed, runs through all the cases. A railroad supplying cars "with the intention that people *with whom it has business* and their help shall work with, about or in the cars"¹³ must use ordinary care to avoid injury to the persons so using the cars. "The contract between the defendant company and the plaintiff's employer created the duty out of which the duty of the defendant to the plaintiff arose."¹⁴ "The revenue of the railroad is dependent upon the patronage of those who have merchandise to transport, and any arrangement between the shipper and the railroad to their mutual benefit" gives rise to the duty above mentioned.¹⁵ Similar expressions are to be found in the opinions of nearly every case¹⁶ where the railroad has been held to owe the duty of exercising reasonable care.¹⁷ Other elements such as the selection of the car¹⁸ and the retention of partial control by the railroad,¹⁹ have in many cases been given prominent consideration,

* See article by Professor F. H. Bohlen, on Basis of Affirmative Obligation in the Law of Torts, 44 Amer. Law Reg. 209, *et seq.*

¹⁰ L. R. 11 Q. B. D. 503 (1883).

¹¹ L. R. 15 Q. B. D. 315 (1885).

¹² 104 Mo. 234 (1891).

¹³ *Sykes v. R. R.*, 88 Mo. App. 193 (1904).

¹⁴ *Hummel v. R. R.*, 167 Fed. 89 (1909).

¹⁵ *R. R. v. Booth*, 98 Ga. 20 (1895).

¹⁶ *Olson v. P. & O. Fuel Co.*, 77 Minn. 528 (1899); *R. R. v. Pritchard*, 168 Ind. 398 (1907).

¹⁷ As to the standard of care required see *White v. R. R.*, 25 R. I. 19 (1903); and *Rehm v. R. R.*, 164 Pa. 91 (1894), a case which should be limited strictly to its facts since the principles upon which the decision is based are clearly fallacious.

¹⁸ *Hale v. R. R.*, 190 Mass. 84 (1906).

¹⁹ *Ladd v. R. R.*, 193 Mass. 359 (1907).

but the element of mutuality of benefit under the traffic agreements is always present.

The negative aspect of the rule placing an obligation upon the railroad in return for the benefit accruing to it, may be seen in two cases. In *Sawyer v. R. R.*²⁰ the car in question which was defectively constructed originally, was being used by the plaintiff's employer after it should have been returned to the defendant railroad. The beneficial interest of the defendant in the use of the car had ceased and the defendant was held not liable. In *Caledonian Ry. Co. v. Mulholland*,²¹ a coal car was delivered upon a siding. The consignees engaged another railroad to move the car some distance further and a servant of the latter was injured by a defective brake. It was held that the first railroad had no interest in the contract between the consignee and the plaintiff's employer and so owed no duty to the plaintiff. On its facts, it seems as if the court might have found a beneficial interest in the defendant but the principle is clear.

Recovery has been denied in this class of cases upon another ground, namely, that there is a duty of inspection and repair incumbent upon the plaintiff's employer whether he is a shipper²² or a receiving railroad,²³ and that the omission or negligent discharge of this duty intervenes between the negligence of the defendant and the injury to the plaintiff, and severs the causal connection between the two. Other cases²⁴ support the principal case and declare that the causal connection is not broken if the intervening negligence might have been anticipated as following the original act of negligence in the natural and ordinary sequence of affairs. The latter view prevails in other classes of torts of negligence and would seem to be correct.²⁵ The principal case is therefore amply supported upon principle and by authority.²⁶

L. P. S.

²⁰ 38 Minn. 103 (1888).

²¹ 1898 A. C. 216.

²² *Risque v. R. R.*, *supra*; *McCullion v. R. R.*, 88 Pac. Rep. 50 (Kas. 1906).

²³ *Sellis v. R. R.*, 124 Mich. 37 (1900); *Glynn v. R. R.*, 175 Mass. 510 (1900), in effect overruled by the principal case; *R. R. v. Merrill*, 65 Kas. 436 (1902), strong dissenting opinion.

²⁴ *Moon v. R. R.*, 46 Minn. 106 (1891); *R. R. v. Snyder*, 55 Ohio St. 342 (1896).

²⁵ *Shearman & Redfield on Negligence* (5th ed.) § 34.

²⁶ A recent Pennsylvania case, *Rick v. R. R.*, 232 Pa. 553 (Dec., 1911), held that a railroad which issued to the shipper a bill of lading for a car of bar iron was liable in damages for an injury to a servant of the consignee caused during the unloading on a private siding of the consignee by a discoverable defect in the floor of the car. The basis of the duty of inspection and repair declared to be owed to the plaintiff is not definitely stated, but it seems to be the contract of shipment whereby the railroad received the benefit of the payment of freight charges. See also *McConnell v. R. R.*, 223 Pa. 442 (1909).